STATE OF MICHIGAN

IN THE SUPREME COURT

BRUCE MILLAR, an Individual,	)	
	)	
Appellant,	)	
vs.	)	**CASE NO. 154437**
	)	
	)	**COA DOCKET NO. 326544**
CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,	)	**Lapeer Circuit Court Case No. 14-047734-CZ(H)**
	)	
Appellees. /	)	

BRUCE MILLAR'S
SUPPLEMENTAL BRIEF

Submitted By:

REBECCA C. KLIPFEL (P58418)
ATTORNEY & COUNSELOR AT LAW
1221 BOWERS STREET, UNIT 2366
BIRMINGHAM, MICHIGAN 48012
PHONE/FAX: (248) 629-4502
rcklipfel@klipfel-law.net

For:
Applicant Bruce Millar
On June 30, 2017

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I. PRELIMINARY STATEMENT REGARDING QUESTION PRESENTED

This Court asked the parties to address a single question in their supplemental briefs: "whether the plaintiff's claim under the Whistleblowers Protection Act was barred by the 90-day limitation period set forth in MCL 15.363(1)." *May 19, 2017 ORDER*. The answer is unequivocally, irrefutably, "NO." Plaintiff-Applicant Bruce Millar has established as a matter of law – directly applied to undisputed facts – that he is that he is entitled to summary disposition in his favor on this issue. This Court further directed that the parties not simply restate their application papers. *Id.* Accordingly, those portions of Bruce Millar's Application For Leave to Appeal pertinent to resolution of the Court's discrete question are not repeated in this supplemental brief, but incorporated by reference.

II. SUPPLEMENTAL ARGUMENT AND ANALYSIS

The pertinent statute provides that a person alleging a violation of the Whistleblowers Protection Act, MCL 15.361, *et seq* ("WPA"), may bring a civil action "within 90 days after the occurrence of the alleged violation of this act." *MCL 15.363(1)*. Defendants violated the WPA when they restricted Plaintiff-Applicant Millar's work duties to exclude the jurisdictions of Defendants Imlay City and Elba Township. That occurred no sooner than Monday, March 31, 2014, the one and only date on which any action was taken to effectuate the restrictions or to communicate them to Millar. Millar timely filed his Complaint 87 days later, on June 26, 2014.[1]

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[1] Key facts were established in the *Affidavit of Bruce Millar in Opposition to Imlay City's Motion to Dismiss and Elba Township's Motion, dated February 13, 2015 ("02/13/15 Millar AFF")*. No Defendant challenged these facts. None submitted any affidavit or proffered other proof contradicting Plaintiff-Applicant Millar's statements, for example, that on

To the extent that they found March 27, 2014 to be the latest possible trigger date for Millar's claims, the lower courts relied on the date on the face of the CCA letter, which was undisputedly hand-delivered by Defendant Construction Code Authority ("CCA") to Millar on March 31, 2014. This reliance is entirely misplaced, as is the lower courts' intensive focus on whether receipt of notice to a plaintiff of a violative occurrence is required to trigger a WPA claim. No Defendant argued – much less established – that anyone took any action to effectuate Millar's new work restrictions or to mail the CCA letter, or email it, or fax it, or otherwise make its contents available to Millar prior to March 31, 2014.[2] The "transmission" of the letter by hand-delivery to Millar was simultaneous with his receipt of notice, and with the action of not returning him to work at sites within Defendant jurisdictions. These events occurred on March 31, 2014. Had any Defendant wished to argue or establish otherwise, it should and could have done so by affidavit or other proof supporting its summary disposition motion at the trial court level. None did so.[3]

Monday, March 31, 2014, he asked why he was not being sent back to the Imlay City site where he had last been working for CCA, on Thursday, March 27, 2014. In response to Millar's March 31, 2014 request, an administrative staff member hand-delivered to Millar the CCA letter bearing the date March 27, 2014 (the "CCA letter"). *Millar AFF.* No Defendant alleged any other chain of events surrounding the simultaneous transmission and receipt of the CCA letter effectuating the work restrictions at issue.

[2] It is likewise undisputed that both Imlay City's and Elba Township's "triggering" letters were addressed to the CCA, not Millar, and that Millar only obtained copies through Defendant CCA after he was informed that he would no longer be assigned to those jurisdictions. *02/13/15 Millar AFF.*

[3] Again, no Defendant proffered any evidentiary support for its motion. None even provided any affidavit from any letter's author authenticating the letter, or when or why it was prepared. This egregious omission, alone, should be fatal to Defendants' arguments. Plaintiff-Applicant Millar's WPA count was dismissed based on unauthenticated documents that no one has even established were written on the dates they bear.

The lower courts' persistent confusion regarding the facts of this case is quite evident. At the hearing before the Court of Appeals, one panelist indicated -- well over 20 minutes into oral argument -- that he had thought that Defendant CCA's letter had been mailed to Plaintiff-Applicant Millar. *Audio Recording of May 11, 2016 COA Hearing ("05/11/16 HRG AUDIO"), 23:45-23:52.*[4] Over 43 minutes into the roughly 49-minute hearing, another panelist stated that he thought he had just heard Defendant CCA's counsel say that the CCA letter had been emailed to Millar. CCA's counsel had said no such thing. No party had even alleged anything close to this in the nearly two years during which this case had been pending at the time of the hearing.

Defendant CCA's counsel confirmed at the hearing that it had never been alleged that the CCA letter was mailed at any time. A highly unusual colloquy followed. Defendant CCA's counsel suddenly and repeatedly announced that she had been told that CCA both wrote and "delivered" the letter bearing the March 27, 2014 date to Millar on that date. CCA's counsel added that she had been told that the CCA letter was left for Millar on March 27, 2014 at his work place, in an unspecified "place where he could find it." *05/11/16 HRG AUDIO, 22:15-22:30, 25:40-29:50.* As Plaintiff Millar's counsel pointed out at the hearing, these "facts" were never asserted prior to the May 11, 2016 hearing. Allowing Defendant CCA's counsel to provide hearsay "testimony" contrary to facts established throughout the three-year history of this case is beyond improper and prejudicial. *05/11/16 HRG AUDIO, 42:33-44:33.* Plaintiff-Applicant Millar swore under oath that the CCA's letter was hand-

[4] Plaintiff-Applicant Millar obtained the audio recording of the May 11, 2016 hearing pursuant to a June 28, 2017 Order of the Court of Appeals.

delivered to him by an administrative employee when he asked on March 31, 2014 why he was not being sent back to the Imlay City site. *02/13/15 Millar AFF.* It would be nothing short of outrageous for any court to find based on the May 11, 2016 comments of Defendant CCA's counsel during oral argument that the CCA letter was not hand-delivered to Millar by an administrative employee on March 31, 2014 after he asked about the change to his work assignments, effectuated that day. *Id.*

In its August 4, 2016 Opinion, the Court of Appeals attempted to steer clear of Defendants' efforts to muddy the factual waters. The court found simply that the date on the face of each Defendant's letter, including those not even addressed to Plaintiff-Applicant Millar, triggered Millar's WPA claims against it. Like the trial court before it and Defendants throughout, the Court of Appeals relied entirely on *Joliet v Pitoniak, 475 Mich 30 (2006),* in making this finding. Defendants and the lower courts simply disregarded nearly the entire intervening decade of Michigan jurisprudence since *Joliet.* None bothered to respond to Millar's multiple well supported arguments why *Joliet* does not come close to warranting summary disposition of his WPA claims.

Joliet does not, in fact, support the lower courts' conclusions. *Joliet* involved constructive discharge claims, which the Court of Appeals explained do not accrue the same way as discriminatory discharge claims are triggered. *Joliet v Pitoniak, 475 Mich 30, 37,* distinguishing *Collins v Comerica Bank, 468 Mich 628 (2003).* Plaintiff-Applicant Millar has exhaustively argued and briefed how both *Joliet* and *Collins* actually do support his position. In both cases, the employer conduct that triggered the applicable limitation period did not occur in a vacuum, but tangibly affected the plaintiff employee. In *Joliet*, this Court did not

permit the plaintiff to extend her time to file in reliance on *her* conduct (i.e., her time began to run when ageist and sexist comments were made to her, not when she decided to quit). *Id.* In *Collins,* this Court distinguished cases where plaintiffs "knew on the last day they worked that their employment had been terminated," effective that day. Collins's time to sue did not begin to accrue on the last day she worked, but on the later date when she knew she was fired. *Collins v Comerica Bank, 468 Mich 628, 633.*

Plaintiff-Applicant Millar has also repeatedly and exhaustively advanced the additional argument that *Joliet* is inapposite to this case because it concerned not the WPA's 90-day period, but the three-year limitation period applicable to claims under Michigan's Elliot-Larsen Civil Rights Act (MCRA), MCL 37.2101, *et seq*, MCL 600.5805 and 600.5827. No Defendant or lower court in this case has even addressed this distinction. This failure is truly remarkable given this Court's decade of post-*Joliet* jurisprudence, comprehensively discussed in Millar's briefs, emphasizing the distinction. No Defendant or lower court in this case addressed this Court's distinction in *Wurtz v Beecher Metro Dist, 495 Mich 242 (2014)*, between the MCRA and corresponding federal statutes on the one hand, and the WPA on the other. None set forth a thought about this Court's admonishment in *Wurtz* against "freewheeling transference" of terms among them. *Wurtz v Beecher, 495 Mich 242 (2014), n 9* ("adverse employment action" is broader under the WPA; WPA does not protect applicants or prospective employees). None had a single thing to say about Plaintiff-Applicant Millar's extensive briefing on the myriad of public policy and other reasons why MCRA cases do not and should not control decisions in WPA decisions, particular relative to their respective

limitations periods (90 days for the WPA, compared to three years for MCRA claims).[5] Each simply cited *Joliet,* then moved on to the next issue.

Similarly, despite Plaintiff-Applicant Millar's thorough discussions of the matter, no Defendant or lower court in this case has addressed this Court's important actions in *Smith v City of Flint, Case No. 152844.* In that case, as here, the Court ordered supplemental briefing and oral argument on the plaintiff's application. The Court expressly directed the parties to address whether the Court of Appeals erred in applying *Pena v Ingham County Road Comm, 255 Mich App 299 (2003)*, an MCRA case, to Smith's WPA count. The Court received supplemental briefs and heard oral arguments. On February 3, 2017, in lieu of granting leave to appeal, this Court reversed the Court of Appeals decision. The Court found that Smith had sufficiently alleged discrimination under the WPA based on a job reassignment unique to him at undesirable times and locations. The Court indicated that its decision in this regard was based on the reasoning of the dissenting opinion in the Court of Appeals.[6] The Court also vacated as prematurely decided the Court of Appeals' *sua sponte* ruling that Smith failed to plead participation in a protected activity because the issue had not been raised by either party or reached by the trial court, and the requirements of MCR 2.116(I)(5) had not been

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[5] Of course, these include the facts that unlike the MCRA, the WPA is expressly premised on the underlying purpose of protecting the public, and that this Court has long required that the WPA accordingly be liberally construed to favor the persons it was intended to protect. *See, e.g., Wurtz v Beecher, 495 Mich 242 (2014); see also Dolan v Continental Airlines/Continental Express, 454 Mich 373 (1997).*

[6] Indeed, this Court went further than the dissenting panel member, who would have held that Smith had at least raised a question of fact through his pleadings. *Smith v City of Flint, 313 Mich App 141, dissenting opinion of Judge Karen M. Fort Hood (2015).*

addressed. The Court remanded the case to the circuit court for further proceedings. *Smith v City of Flint, 889 NW2d 507 (Mich 2017).*

Like Smith, Plaintiff-Applicant Millar has not only raised a question of fact regarding the central issue at hand, he has established that he is entitled to judgment in his favor on that issue. Millar requests that this Court provide the same relief it afforded to Smith, but regarding the central issue of this supplemental brief. That is, Millar requests that this Court not only reverse the lower courts' findings that his WPA claims were barred by the 90-day bar, but also find and order that he has established pursuant to MCR 2.116(C)(7) and other applicable rules and law that his WPA count was timely filed.

Defendants' arguments and the lower courts' opinions regarding the effects of the letters from Imlay City and Elba Township to the CCA bearing the dates March 20, 2014 and March 11, 2014, respectively, are internally inconsistent and, frankly, nonsensical. The Court of Appeals wrote:

> . . . . a claim accrues at "the time the wrong upon which the claim is based was done regardless of the time when damage results." *Joliet, 475 Mich at 36.* Here, the alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity-- i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates.

Court of Appeals Opinion dated August 4, 2016 ("08/04/16 COA Order"), p. 6. Even assuming that the referenced letters were properly authenticated, which they were not, these statements cannot be reconciled with the established facts of this case or the remainder of the Court of Appeals Opinion.

First, no Defendant has disputed and the lower courts unequivocally held that Plaintiff-Applicant Millar established that all Defendants are "one-in-the-same for purposes of the WPA." The Court of Appeals explained:

> [P]laintiff alleged that the City and Township exercised control over CCA through appointment of CCA's board of directors such that the City and Township constituted plaintiff's "employer" for purposes of the WPA. In essence, plaintiff claimed that the CCA was an extension of the City and the Township and neither the City nor the Township challenged plaintiff's assertion.

08/04/16 COA Order, pp. 1, 8. Millar's time to file his WPA suit cannot have accrued at a different time relative to each Defendant. It has been established that Defendants Imlay City and Elba Township were alter egos of the CCA relative to Millar's employment; each is accordingly responsible for the CCA's actions. They cannot escape liability for Millar's WPA count by somehow disavowing any relation to the CCA's letter, or to the CCA's actions of hand-delivering its letter to Millar and no longer assigning Millar to work in their jurisdictions on March 31, 2014.[7]

Second, the Court of Appeals' holdings cannot be reconciled with the undisputed facts established by Plaintiff-Applicant Millar regarding his work within the jurisdictions of

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[7] The Court of Appeals went on to dismiss Plaintiff-Applicant Millar's civil conspiracy count, writing that "because plaintiff alleged that the three entities were one-in-the-same for purposes of the WPA, plaintiff cannot show that there were three separate entities that conspired together to terminate him." *08/14/16 COA Order, p. 8.* This statement reveals a recurring error by all Defendants and the courts below regarding the standards for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). None demonstrated awareness of Michigan's system of notice pleading or pleading in the alternative. *MCR 2.111 and 2.113.* If Plaintiff-Applicant Millar's conspiracy count fails, it is not because he "alleged" that Defendants were alter egos; it is because he *established* those facts. *Neal v Neal, 219 Mich App 490, 495 (1996).* However, these and any arguments other than whether Plaintiff-Applicant Millar's WPA count was time barred are beyond the scope directed by this Court for this supplemental brief. *May 19, 2017 ORDER.*

Defendants Imlay City and Elba Township. The Court of Appeals stated that Defendants Imlay City and Elba Township each "terminated plaintiff," on March 11, 2014 and March 20, 2014, respectively. *08/14/16 COA Order, p. 6.* However, Millar averred in his February 2015 affidavit in opposition to Defendants' motions that inspection records showed that he was performing inspections within Imlay City on dates including March 10, 14, 19 and 27, 2014 and within Elba Township on dates including March 14 and 17, 2014. *02/13/15 Millar AFF.* No Defendant has at any time proffered a scintilla of evidence – or even argued – different facts. Plaintiff-Applicant Millar worked in Imlay City and Elba Township many times after the dates of their respective letters to the CCA. Neither can claim to have "terminated" Millar from working within its jurisdiction via its own earlier letter to the CCA.

III. CONCLUSION

Adopting the Court of Appeals' view of accrual of WPA claims would plainly and simply permit any employer to avoid such claims by producing writings referencing allegedly violative conduct and bearing dates more than 90 days prior to the suit's filing. An employer could do this on any improper work restriction (or termination) claim despite undisputed demonstration that the plaintiff employee continued repeatedly to engage in purportedly restricted activity after the date appearing on the unauthenticated writing. An employer would not even have to deliver – or try to deliver, or even intend to deliver – the writing to the employee, or otherwise to inform the employee of termination or restriction of work duties. This result cannot stand.

This Court directed the parties to address only whether Plaintiff-Appellant Millar's WPA claims were barred by the 90-limitation period in these supplemental briefs.

Accordingly, Millar here asks only that this Court reverse the lower courts' erroneous findings in this regard and enter an order granting him summary disposition in his favor on his timely filing of his WPA claims. Millar discusses at length how and why even an unfavorable decision on this issue does not lead to the collapse of any "sandcastle," to borrow a phrase from the Court of Appeals in oral argument; Millar's remaining claims remain viable notwithstanding any unfavorable decision regarding the timely filing of his WPA count. Millar does not address this here not only because of this Court's proscription of issues to be addressed in this supplemental brief, but also because he is so confident that this Court will correct three years of misguided and erroneous decisions in this case and find that Millar has established as a matter of law that his WPA claim was timely filed. Finally, Millar reiterates his request that this Court award him the considerable costs and attorney fees, as provided in the WPA, as the prevailing party on this issue. Millar respectfully requests that this Court also award him such other and further relief as it deems appropriate under these circumstances.

Respectfully submitted,

DATED: June 30, 2017

REBECCA C. KLIPFEL (P58418)
1221 BOWERS STREET, UNIT 2366
BIRMINGHAM, MICHIGAN 48012
(248) 629-4502
RCKlipfel@klipfel-law.net

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